BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(1) THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 115 Fed. (2d) 521. (See R. 173)

The opinion of the United States District Court is reported in 28 F. Supp. 3.

The opinion on denial of the motions to dismiss is reported in 30 F. Supp. 346.

(2) JURISDICTION.

The decision of Circuit Court of Appeals was entered November 18, 1940. (R. 179)

The jurisdiction of this Court is invoked under Section 240(a), as amended, of the Judicial Code (28 U. S. C. A. Par. 347). The petition is filed in accordance with Rule 38 of this Court.

(3) STATEMENT OF THE CASE.

A summary of the case will be found under the heading "Summary Statement of the Matter Involved" in the Petition for Writ of Certiorari to which this brief is annexed. In the interest of brevity the statement will not be repeated.

(4) SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction of the first cause of action in plaintiffs' complaint because:

(a) The allegations of said first cause of action fail to state facts sufficient to state a cause of action against the resident defendant, Jerry Goddard.

(b) The allegations of said first cause of action established the existence of a separable controversy between the resident minor plaintiff and the non-resident defendant,

May Company, namely, a controversy as to the maintenance by that defendant of an escalator attractive to children, to which controversy the resident defendant, Goddard, was not a proper party and in which controversy he was in no wise interested.

2. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction of the second cause of action in plaintiffs' complaint because:

The allegations of said second alleged cause of action established the existence of a separable controversy between the resident minor plaintiff and the non-resident defendant, May Company, in that these allegations established a controversy between said parties as to negligence upon the part of said defendant in the maintenance, operation, supervision and control of the escalator, to which controversy the resident defendant, Goddard, was not a proper party and in which controversy he was in no wise interested.

3. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction of the entire case, since

(a) The first cause of action therein constituted a separable controversy between the resident minor plaintiff and the non-resident defendant, May Company.

(b) The second cause of action therein contained a separable controversy between the resident minor plaintiff and the non-resident defendant, May Company.

4. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction to render a judgment between the resident minor plaintiff and the non-resident defendant, May Company, in the controversies between them to which the resident defendant, Goddard, was not an indispensable party.

5. The Circuit Court of Appeals erred in holding that the District Court did not have jurisdiction to render a judg-

ment between the resident minor plaintiff and the non-resident defendant, May Company, upon the dismissal of the case as to the resident defendant, Goddard.

(5) ARGUMENT.

POINT I.

The First Cause of Action Failed to State Facts Sufficient to Constitute a Cause of Action Against the Resident Defendant, Goddard.

The first cause of action is based on the alleged maintenance *by the defendant May Company* of an instrumentality attractive to children. (R. 5)

It was the theory of plaintiffs that it was the action of the escalator when reversed that severed the plaintiff's fingers rather than the catching of his hand during the forward motion of the escalator. (R. 128) Consequently, it was necessary for the plaintiff to connect the injury so sustained with the alleged negligence in the maintenance of the escalator. To do this plaintiffs were required to allege how the escalator came to be reversed so that they could claim that the injury followed as a natural and unbroken sequence from the alleged negligence in its maintenance. That this was the only purpose in including the allegation as to the conduct of the defendant Goddard in stopping and reversing the escalator is shown by the facts that (1) the cause of action contained no allegation of negligence with respect to these facts, and (2) on the contrary, the injury is specifically alleged to have been due to negligence in failing to cover the aperture between the stationary comb-plate and the moving steps.

The maximum, therefore, that can be said of the allegations of this cause of action as charging the defendant Goddard with negligence is that inferentially they might charge him with "nonfeasance" in failing to cause the aperture to be covered or guarded, with no allegation of any duty upon his part to have done so. It is the universally recog-

nized rule of law that mere nonfeasance upon the part of an employee in connection with safeguarding the instrumentalities of his employer is not sufficient to give rise to a cause of action against that employee in favor of one injured by such instrumentality.

In *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176, 51 L. Ed. 430, the complaint alleged that the defendant non-resident corporation employed the plaintiff in certain work in connection with the melting of grease and lubricant matter which was delivered by the corporation to the plaintiff in large barrels, and that it was plaintiff's duty in the course of his employment to hoist the same to the surface of the furnace structure into which the pots were set, and then to dump the grease and lubricant matter into the pots. The negligence charged against the corporation consisted in allowing the pots to remain open and exposed without covering, railing, device or any means to protect the plaintiff from accidentally slipping or falling into the same while engaged in the performance of his duties. The negligence charged against the resident defendants was that they were employed by the corporation, and charged by it with superintending and oversight of the plaintiff in the performance of his duties, that they were employed and charged by the corporation with the duty of superintending and properly planning the construction of the furnace, and with the duty of providing reasonably safe pots with suitable covering, railing and other devices, and with the duty of instructing the plaintiff as to the manner of performing his duties. Negligence was also alleged as to the non-resident corporation in providing unsafe working conditions and as to the resident defendants in the planning and directing of the construction thereof and in the giving of instructions as to the maner of performing plaintiff's duties. It was held that the case was properly removed to the federal court.

Wilson v. *Republic Iron & Steel Co.*, 257 U. S. 92, 66 L. Ed. 144, was an action by an employee against his employer

and a co-employee to recover for injuries sustained by the plaintiff by reason, as was alleged, of his conforming to an order or direction negligently given to him by a co-employee and to which he was bound to conform. The defendant nonresident employer filed a petition for removal. The petition for removal was granted and a motion to remand later denied. The Supreme Court on writ of error held that the District Court rightfully sustained its jurisdiction of the cause.

In *Clancy* v. *Brown* (C. C. A. 8), 71 Fed. (2d) 110, the complaint alleged that the nonresident defendant corporation was engaged in operating a hotel; that the resident defendant employee was the housekeeper and superintendent of the corporation in charge of hotel and was a vice-principal with power to employ and discharge employees, and that the plaintiff worked under her, subject to her orders and directions; that while the plaintiff was so employed, she was ordered by the resident employee defendant to go to a roof gathering with other employees; that the only available path to the roof was a stairway which was lighted and which was under the control and supervision of the defendants and was maintained by them, and that while plaintiff was returning from the roof, through the joint and concurring negligence of the defendants in failing to properly light and maintain said stairway, she fell and was severely injured. The court held that the complaint did not establish a cause of action against the resident employee defendant and that the federal courts, therefore, had jurisdiction.

In *Knight* v. *Atlantic Coast Line* (C. C. A. 5), 73 Fed. (2d) 76, the complaint alleged that the resident section foreman engaged in clearing the nonresident railroad's right-of-way of ignitible material allowed a large quantity of ignitible material to remain and breached a duty to the public to keep the right-of-way reasonably free from such substances; that a fire was caused by sparks from a locomotive, which spread to the land of the plaintiff. The court held

that the complaint failed to state any cause of action against the resident foreman, and affirmed the jurisdiction of the District Court to hear the case. In so holding, the court says (p. 77):

> "As to the public generally, and as to the appellant as one of the public, it was not made to appear by allegations of fact that Poppel was under any duty with reference to the condition of the part of the right of way where the fire started. The allegations of the petition do not show that Poppell incurred any liability to the appellant by failing or omitting to do anything with reference to easily ignitible material on the part of the right of way where the fire started, or in any other way. It follows that the petition failed to allege any cause of action against Poppell, and that the court did not err in denying the motion to remand."

Likewise, in the present case, plaintiffs' complaint failed to show that the defendant Goddard had any duty whatsoever with respect to the escalator, either to his employer or to the public generally. The complaint in the case at bar did not even contain the general allegation that he owed a duty to the plaintiffs, either as members of the public or otherwise. Again, in the cited case, it appears that the resident employee could have removed the danger, whereas in the case at bar there is neither allegation nor proof to that effect.

In *Winfield* v. *Wichita Natural Gas Co.* (C. C. A. 8) 267 Fed. 47, it is said at page 52:

> "It is the controversies the facts pleaded in the complaint portray, not the legal conclusions the pleader alleges result from those facts, nor his averments of joint action, nor his prayer for relief, that determine whether or not the controversies disclosed by the complaint are separable. The material facts pleaded in this complaint have been thoughtfully considered in view of this rule of pleading, and the conclusion is irresistible that the controversies between these parties which they disclose are separable."

See also:

Jackson v. *Chicago etc. Ry.* (C. C. A. 8), 178 Fed. 432, 434; *Epperson* v. *Midwest Refining Co.* (C. C. A. 8), 22 Fed. (2d) 622.

In *Macutis* v. *Cudahy Packing Co.* (D. C. Neb.), 203 Fed. 291, the complaint was against a non-resident corporation and its resident foreman for personal injuries, alleging the failure of the foreman to maintain the place where plaintiff was required to work and the appliances in a reasonably safe condition. It was held that the complaint did not state a cause of action against the foreman personally, and that the case was removable to the federal court. The case was subsequently cited with approval by the Fifth Circuit in the *Knight* case, *supra.*

In Floyt v. *Shenango Furnace Co.* (C. C. Minn.), 186 Fed. 539, the complaint alleged negligence of a superintendent in failing to see that a ladderway in a mine was in a reasonably safe condition. It was again held that mere nonperformance on the part of the superintendent did not constitute a cause of action against him, and that the case was removable by his employer nonresident corporation. This case was cited with approval in the Fifth and Eighth Circuits, in the *Clancy* and *Epperson* cases, *supra.*

In addition, we would call the attention of this Court to numerous similar decisions of various Federal Courts, the cumulative effect of which is highly persuasive.

Franklin v. *May Department Stores Co.*, 25 Fed. Supp. 735; *Hane* v. *Mid-Continental etc. Co.*, 47 Fed. (2d) 244; *Shaver* v. *Pac. Coast etc. Co.*, 185 Fed. 316; *Marach* v. *Columbia Box Co.*, 179 Fed. 412; *Plunkett v. Gulf Refining Co.*, 259 Fed. 968; *Johnson* v. *Coast Mfg. etc. Co.*, 53 Fed. (2d) 271; *Morefield* v. *Ozark Pipe etc. Co.*, 27 Fed. (2d) 890; *Forrest* v. *Southern Ry. Co.*, 20 Fed. Supp. 753; *Davis* v. *St. Louis etc. Ry Co.*, 8 Fed. Supp. 519; *Puckett* v. *Columbus Power Co.*, 248 Fed. 353; *Richardson* v. *Southern Idaho etc. Co.*, 209 Fed. 949; *McAllister* v. *Chesapeake & Ohio Ry.*, 198 Fed. 660; *Cayce* v. *Southern Ry. Co.*, 195 Fed. 786; *Bain-*

bridge Co. v. *Atlantic etc. Line*, 182 Fed. 276; *Evansburg* v. *Insurance etc. Co.*, 168 Fed. 1001; *Adderson* v. *Southern Ry. Co.*, 177 Fed. 571; *McIntyre* v. *Southern Ry. Co.*, 131 Fed. 985; *Ferguson* v. *Chicago etc. Ry.*, 63 Fed. 177.

POINT II.

The First Cause of Action Sets Forth a Separable Controversy Between the Resident Plaintiff and the Non-Resident Defendant, May Company.

It follows from the foregoing that the first cause of action necessarily sets forth a separable controversy between the minor plaintiff and the defendant May Company, to which the defendant Goddard is not even a proper party.

Moreover, from its very nature a cause of action based upon the theory of the maintenance of an attractive instrumentality can only be against a defendant which is alleged to have maintained that instrumentality.

The Court will also remember that this is not a case wherein the plaintiffs, having a right so do, elected to frame their complaint so as to bring it within the exclusive jurisdiction of the State courts. On the contrary, the plaintiffs elected to set forth in their first cause of action a separable controversy between them and the non-resident corporation defendant, carefully alleging in that cause of action all of the necessary facts to confer jurisdiction upon the District Court, and carefully refraining from any allegation not necessary to establish such jurisdiction. Thus, there is no allegation whatsoever as to the residence or citizenship of the plaintiff father (whose only interest as a plaintiff is in the third cause of action) or of the defendant Goddard. None of the allegations of the remaining causes of action are referred to or incorporated in the first cause of action.

It seems obvious that in framing the complaint the plaintiffs did not regard the first cause of action as being against anyone except the defendant May Company and that they did regard it as being a separate and distinct cause of ac-

tion against that defendant which they were entitled to bring and maintain in the District Court.

The allegations of the first cause of action cannot be considered as enlarged by any allegations contained in the remaining causes of action, since these latter are not incorporated or even referred to in that first cause of action. This is true both under the Federal Rules of Civil Procedure (Rule 10(b) and 10(c)) and also under the Conformity Act (R. S. 914, 28 U. S. C. A. 724), in so far as this statute is still in effect as not inconsistent with said Federal Rules. *Hopkins* v. *Contra Costa*, 106 Cal. 566, 570; 39 Pac. 933; *Little* v. *Union Oil Co.*, 73 Cal. App. 612, 617-618; 238 Pac. 1066.

POINT III.

The Second Cause of Action Sets Forth a Separable Controversy Between the Resident Plaintiff and the Non-Resident Defendant, May Company.

The second cause of action, in so far as the allegations of fact are concerned, is but a repetition of the first cause of action. It differs from the first cause of action solely in the allegations as to the proximate cause of the injury to the minor plaintiff.

Whether or not negligence upon the part of the defendant Goddard is to be deemed sufficiently alleged in this second cause of action, upon the same principles discussed with reference to the first cause of action a separable controversy is set up in that second cause of action between the resident minor plaintiff and the non-resident defendant, May Company, arising out of the alleged negligent maintenance by the latter of an instrumentality attractive to children, to which controversy the defendant Goddard still is not even a proper party.

In connection with both the first and second causes of action it is especially significant that no attempt whatsoever was made to establish on the trial of the case that any of the acts of the defendant Goddard were negligent. No

evidence whatsoever addressed to that point was introduced. No attempt was made to show that that defendant did not have a knowledge of the mechanics of the escalator or a sufficient knowledge thereof to justify him acting in the emergency. No attempt was made to establish that it was unwise or improper to have stopped the escalator or to have reversed its action. No attempt was made to show that any other course of action would have been wiser or would have resulted in less injury to the minor plaintiff. No attempt was made to show that the severance of the fingers of the plaintiff's hand was in fact caused by the reversing of the escalator. On the other hand, the testimony of plaintiff's physician, Dr. Alfred E. Gallant, indicates that the damage to the plaintiff's hand must have been done before the reversal of the escalator. (R. 76)

We submit that the utter failure even to attempt to establish on trial a right of recovery against the defendant Goddard is highly persuasive that not only was the controversy between the minor plaintiff and the non-resident defendant, May Company, separable from any controversy between that plaintiff and the defendant Goddard, but that, in fact, no controversy whatsoever did exist between that plaintiff and that resident defendant.

Likewise, we submit that this utter failure even to attempt to establish on trial a right of recovery against the defendant Goddard establishes an abandonment of any cause of action against the defendant Goddard, leaving the case solely between the resident minor plaintiff and the non-resident defendant, May Company.

Finally, in this connection we would call this court's attention to the fact that upon the appeal to the Circuit Court of Appeals, in their briefs or on oral argument, appellants failed to advance any reason, argument or authority in any wise tending to show error upon the merits upon the part of the trial court in dismissing the case as to that resident defendant, Goddard. (R. 95 to 152; especially Tr. p. 142.)

We submit that both the pleadings, the conduct of the

case upon trial, and the presentation of the case upon appeal, all conclusively show that separable controversies between the resident plaintiff and the non-resident defendant, May Company, were set forth, and were intended to be set forth, in both the first and second causes of action in plaintiffs' complaint.

POINT IV.

Authorities Showing That a Separable Controversy Exists and the District Court has Jurisdiction.

It is thoroughly settled that where a separable controversy exists between a resident plaintiff and a non-resident defendant the District Court has jurisdiction thereof and the case may be removed from the State courts to such District Court.

In *Nichols* v. *Chesapeake & Ohio Ry. Co.* (C. C. A. 6), 195 Fed. 913, the original complaint alleged negligence of one Cook as the engineer of the defendant's railroad trains and alleged the company's negligence by reason of the doctrine of *respondeat superior*. Subsequently, the complaint was amended by adding thereto an additional cause of action based upon the Federal Safety Appliance Act. *After the amendment*, the defendant filed a petition for removal on the ground of separable controversy. The Circuit Court of Appeals held that this additional cause of action constituted a separable controversy between the plaintiff and the defendant railway company, and hence that the case was removable, the court saying, page 915:

> "By the amended petition of July 1905, it appeared that a controversy existed whether the Railway Company was liable to Nichols by reason of the existence and effect of the Safety Appliance Act. This was a controversy with which Cook was not concerned. It was not alleged that he was liable, or that the Railroad Company, through him, was liable upon this subject-matter."

Likewise, in the case at bar, it appears that a controversy existed whether the May Company was liable by reason of the maintenance of an instrumentality alleged to be attractive to children. This was a controversy with which the defendant Goddard was not concerned. It was not, nor could it be, alleged that he was liable or that the May Company, through him, was liable upon this subject-matter.

Continuing, the court, in the *Nichols* case, says:

> "At the same time the petition alleged a joint liability against the Company and Cook, resulting from Cook's common-law negligence as engineer in the management of the train. It has been distinctly held by the Supreme Court (Union Pac. Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983) that the liability under a statute for failing to observe its provisions and the liability under the common-law rules of negligence may give rise to causes of action so separate that one may be barred by statute where the other would not be. It seems necessarily to follow that, where there are separate or distinct causes of action, there must be separable controversies. Each cause of action must present a controversy. Different rights of action may, it is true, often be joined in one suit, but this does not make them inseparable. The existence of the 'separable controversy' right of removal presupposes that it may be found joined in one action with another controversy. In the present case, even if the cause of action is not 'separate,' yet the 'separable' character of the claim under the statute is made clear by the fact that one of the defendants has no concern with this question. We are satisfied that the second removal petition conferred jurisdiction on the federal court (Jackson v. C., R. I. & P. Ry. Co., 178 Fed. 432, 102 C. C. A. 159), and that the action which had been commenced in March and was then pending in the state court upon the amended July petition was, for the first time, effectively removed."

In *Pullman Co.* v. *Jenkins*, 305 U. S. 534, 83 L. E. 334, the complaint alleged that the decedent was employed by the Southern Pacific Company as a conductor of a train;

that his death resulted from injuries due to a blow struck him by one Kash, who was being removed from the train by police officers called to assist the Pullman conductor in ejecting Kash because of Kash's disorderly conduct. Negligence was charged against the Southern Pacific Company and its gatetender in permitting Kash, while intoxicated, to go through the gates leading to the train. The negligence charged against the Pullman Company and its porter consisted in permitting Kash to board the Pullman sleepers.

The court held that the cause was not removable to the District Court *by the defendant Pullman Company* because of that joint negligence alleged against it and its porter, but the court also recognized that the complaint did state separable controversies between the plaintiffs and the defendant Kash (83 L. E. pp. 338-339), and between the plaintiffs and the Southern Pacific Company (83 L. E. p. 339). Moreover, citing the *Nichols* case, *supra*, the court said (83 L. E. p. 338):

> "If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants does not preclude removal. Barney v. Latham, 103 U. S. 205, 26 L. ed. 514, supra; Nichols v. Chesapeake & O. R. Co. (C. C. A. 6th) 195 F. 913, 915, 916; Stewart v. Nebraska Tire & Rubber Co. (C. C. A. 8th) 39 F. (2d) 309, 311; Des Moines Elevator & Grain Co. v. Underwriters' Grain Asso. (C. C. A. 8th) 63 F. (2d) 103, 105."

On this point we would also refer this Court to the cases of:

> *Young* v. *So. Pac. Co.* (C. C. A. 2) 15 Fed. (2d) 280; *Jacobson* v. *Chicago, etc. Ry Co.* (C. C. A. 8), 66 Fed. (2d) 688; *Jackson* v. *Chicago, etc. Ry. Co.* (C. C. A. 8), 178 Fed. 432; *Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28 (Reversed on other grounds by Supreme Court); *Barney* v. *Latham*, 103 U. S. 205; 26

L. E. 514; *Geer* v. *Mathieson*, 190 U. S. 428; 47 L. E. 1122; *Connell* v. *Smiley*, 156 U. S. 335; 39 L. E. 443.

POINT V.

The Jurisdiction of a Federal Court is not Less Extensive Because a Suit is Instituted in That Court Than it Would be Were the Suit Commenced in the State Courts and Removed to the Federal Court.

Consequently, the Authorities Dealing with the Right of a Defendant to Removal from the State Courts are Equally Applicable to the Question of the Jurisdiction of a Federal Court in a Suit Commenced Therein.

The jurisdiction of the District Court in a case of this character, whether filed therein originally or removed thereto from a State court, is founded upon Judicial Code Section 24, as amended (28 U. S. C. A. 41 (1)), as follows:

> "The district courts shall have original jurisdiction as follows: 1 . . . . Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . . (b) Is between citizens of different states . . . .".

The right to remove a case from a State court to a Federal court is founded upon Judicial Code Section 28, as amended (28 U. S. C. A. 71), as follows:

> " . . . . Any other suit of a civil nature, at law or in equity, *of which the district courts of the United States are given jurisdiction* by this title, and which are now pending or which may hereafter be brought in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein being non-residents of that State. And when *in any suit mentioned in this section* there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district . . . ." (Italics ours.)

It follows from the above statutory provisions that authorities dealing with the jurisdiction of the district courts upon petitions to remove thereto from the State courts are equally applicable upon the question of the jurisdiction of those district courts in cases originally filed therein.

POINT VI.

Where a Complaint is Filed in a State Court Setting Forth a Separable Controversy, and is Removed to the District Court, That Court has Jurisdiction of the Entire Action. The Rule is the Same Where the Suit is Originally Filed in the District Court.

In removal suits it is thoroughly established that where the complaint contains a separable controversy, upon removal to the District Court, not merely that separable controversy but the entire suit is so removed to that District Court.

In *Barney* v. *Latham*, 103 U. S. 205, 26 L. E. 514, 518, the court says:

> "We are of opinion that, upon the filing of the petition and bond by the individual defendants in the separable controversy between them and the plaintiffs, the entire suit, although all of the defendants may not have been proper parties thereto, was removed to the Circuit Court of the United States, and that the order remanding it to the State court was erroneous."

In *Geer* v. *Mathieson*, 190 U. S. 428, 47 L. E. 1122, 1124, the court says:

> "A suit may, consistently with the rules of pleading, embrace several distinct controversies. . . . In other words, as expressed in *Fraser* v. *Jenneson*, 106 U. S. 194, 27 L. E. 132, 1 Sup. Ct. Rep. 171, 'a case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined

> without the presence of any of the other parties to the suit as it has been begun.' And, when two or more causes of action are united in one suit, there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which, if it had been sued on alone, would be removable."

See, also, *Connell* v. *Smiley*, 156 U. S. 355; 39 L. E. 443, 445.

In *Jacobson* v. *Chicago etc. R. Co.* (C. C. A. 8), 66 Fed. (2d) 688, in a negligence action, quoting from *Strother* v. *Union Pac. R. Co.* (D. C.) 220 Fed. 731, 733, the court says:

> " 'If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it.' "

In *Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28, the complaint was in two counts and, as in the present case, the second count adopted the allegations of the first count. The plaintiff was the administrator of the estate of the decedent. He was a resident of the State of Louisiana, of which State the defendants were also residents.

In the first count recovery was sought for damages sustained by the widow and children of the decedent by reason of his death. In the second count recovery was sought for the pain and suffering sustained by the deceased prior to his death. Under the laws of Oklahoma recovery on the first count would be solely for the benefit of the widow and children, though first passing into the estate of the decedent. Recovery upon the second count, however, would become general assets of the estate of the decedent.

The Circuit Court of Appeals held that the widow and children were the real parties in interest in the first count and that as they were residents of the State of Oklahoma,

diversity of citizenship existed between them and the defendant and that irrespective of the second count in the complaint the cause was removable from the State court to the District Court. In so holding the court says, p. 30:

> "Coming now to the second cause of action removed and pleaded in the petition, it may be said that cause of action could neither have been brought in the Federal court nor, standing alone, have been removed thereto for want of jurisdiction over the subject-matter in a federal court, for the jurisdictional amount in controversy was not claimed, and any recovery had would go into the estate for administration and distribution by the administratrix. However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts or causes of action, one of which controversies is removable into a federal court and the other not removable, a removal into a federal court of the causes of action which may be removed brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf. (Citing many authorities.)"

This Court granted certiorari in the above case and reversed the decision of the Circuit Court of Appeals, but did so on the ground that it was the residence of the plaintiff administrator, and not the residence of the widow and children, which controlled, and that, therefore, diversity of citizenship did not exist as to either count.

Assuming that we are correct in our contention that the complaint contains a "separable controversy", then had that complaint been filed in the State court and thereafter there had been filed a petition for removal to the District Court, that District Court would have had jurisdiction to determine the entire case, both the "separable controversy" and all other controversies contained therein. There can be no serious assertion that the rule is different where the cause is filed originally in the District Court.

We submit that the District Court had jurisdiction over each of the first and second causes of action in plaintiffs'

complaint because of the existence in each of a controversy solely between the resident plaintiff and the non-resident defendant, May Company, and that, therefore, the District Court necessarily had jurisdiction over the entire action.

POINT VII.

The Defendant Goddard Was Not an Indispensable Party in so far as the Controversy Between the Resident Plaintiff and the Non-Resident Defendant, May Company is Concerned. Therefore the District Court had Jurisdiction Over Said Controversy.

The very least that can be said with regard to the present case is that the defendant Jerry Goddard was not an indispensable party to the controversy between the resident minor plaintiff and the non-resident defendant, May Company, arising out of the maintenance, operation, supervision, and control of the instrumentality alleged to have been attractive to children.

Not being an indispensable party to such controversy, his joinder as a defendant cannot defeat the jurisdiction of the District Court over that controversy, and its judgment, at least in so far as that defendant is concerned, must be affirmed.

In *Cameron* v. *McRoberts*, 3 Wheat. 591, 4 L. E. 467, the plaintiff, a citizen of Kentucky, instituted a suit in the United States District Court of Kentucky. The defendant Cameron was a citizen of Virginia but certain of the other defendants were citizens of Kentucky. Cameron moved to dismiss the suit on the ground of lack of jurisdiction. Consequently, the question arose as to whether the District Court had jurisdiction of the case as to all defendants, or if not, whether it had jurisdiction as to the defendant Cameron alone. The question was certified to this Court and the following answer given:

> "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that sub-

stantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised to him alone."

In *Boon's Heirs* v. *Chiles*, 8 Pet. (U. S.) 532, 536, 8 L. E. 1034, 1036, the suit was instituted in the Federal District Court, praying that the defendant Chiles or such other of the defendants as may hold the legal title to certain property be decreed to convey it to the plaintiff, and for general relief. The court said:

> "We think, therefore, that the question between the plaintiffs and the defendant William Chiles is within the jurisdiction of the Circuit Court for the District of Kentucky, and may be decided by that court, though Hay's heirs were not parties to the suit. That they were made parties, cannot oust the jurisdiction as between those who are properly before the court."

Armstrong v. *New La Paz etc. Co.* (C. C. A. 9), 107 Fed. (2d) 453, involved a tort action against certain partners, one of whom was a resident of the same state as the plaintiff. In affirming jurisdiction of the District Court, it is said, page 454:

> "Appellants attack the jurisdiction of the District Court to entertain the action or to render any judgment contending that the action is against the copartnership, and that McDonald was therefore an indispensable party. If this were true it would follow that there would not be the diversity of citizenship necessary to confer jurisdiction on the federal courts. However, upon this point we deem it sufficient to say that the defendants herein are sued individually upon their joint and several liability for the alleged tort. That such joint and several liability exists in Arizona is clear from Revised Code of Arizona, 1928, Section 3836 and the case of Evans v. Colorado Sav. Bank, 41 Ariz. 504, 19 P. 2d 1062."

Likewise, under California law, the liability of an employer and an employee for personal injuries is joint and several and either employer or employee may be sued sepa-

rately. *Rogers* v. *Ponet*, 21 Cal. App. 577, 581; 132 Pac. 851, 853; *Gosliner* v. *Briones*, 187 Cal. 557, 563; 204 Pac. 19, 22.

In *Hirsch* v. *Stone* (C. C. A. 5), 62 Fed. (2d) 120, 122 (Certiorari denied, 289 U. S. 747, 77 L. E. 1493), the suit was instituted in the United States District Court. On the question of jurisdiction the court says, page 122:

> "Jurisdiction is not defeated by the joinder or failure to join formal or unnecessary parties."

Blytheville etc. Co. v. *St. Louis-San Francisco Ry. Co.*, (C. C. A. 8), 33 Fed. (2d) 481, also involved a suit commenced in the United States District Court. In connection with the question of jurisdiction, the court says, page 483:

> "The Supreme Court of the United States in *Wormley* v. *Wormley*, 8 Wheat. 421, 451 (5 L. E. 651), has laid down the following rule:
>
> 'This court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others.'"

It is interesting to note that in both of the last cited cases, though the actions were commenced in the Federal District Courts, nevertheless, on the question of jurisdiction the courts cite "removal cases", amongst which is the case of *Salem Trust Co.* v. *Mfrs. Finance Co.*, 264 U. S. 182, 189, 68 L. E. 628, 631, wherein the court says:

> "The district courts have original jurisdiction of controversies between citizens of different states (Const. art. 3 § 2; Judicial Code, § 24); and when, in any suit brought in a state court, there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, a defendant interested in such controversy may remove the suit to the proper district court of the United States. Judicial Code, § 28. District courts have jurisdiction if all the parties on the one side are of citizenship diverse to

those on the other side. Jurisdiction cannot be defeated by joining formal or unnecessary parties. The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed (Barney v. Latham, 103 U. S. 205, 215, 26 L. ed. 514, 518; Ex parte Nebraska, 209 U. S. 436,444, 52 L. ed. 876, 879, 28 Sup. Ct. Rep. 581), and is not affected by the fact that one of the defendants is a citizen of the same state as the plaintiff, if that defendant is not an indispensable party to the controversy between plaintiff and defendant, who are citizens of different states (Barney v. Latham, supra, 213)."

Weiland v. *Pioneer Irrigation Co.* (C. C. A. 8), 238 Fed. 519 (affirmed, 259 U. S. 498, 66 L. E. 1027), again involved a suit instituted in the Federal District Court. On the question of jurisdiction the court says, page 522:

"At the trial the defendants offered to prove that the owner of the Carroll and Gilmore ditch, at the time of the commencement of the action were, and ever since had been, citizens of the State of Nebraska, the same state as that of the plaintiff. Counsel for plaintiff admitted that such was the fact. The court ruled that, conceding the facts to be as stated it did not oust the court of jurisdiction. We do not think there was error in this ruling, as the defendants brought into the court by order of the court were not indispensable parties, without whom no decree could be rendered."

In the present case the District Court had jurisdiction of the controversy between the resident minor plaintiff and the non-resident defendant, May Company, arising out of the maintenance and operation by the latter of the escalator alleged to have been attractive to that plaintiff. Consequently, the Circuit Court of Appeals was in error in ordering the dismissal of the case as to that non-resident defendant, and we submit that under the rule laid down in "removal cases" the District Court had jurisdiction of the present action in its entirety.

POINT VIII.

Upon the Dismissal of the Case as to the Resident Defendant Goddard, the District Court had Jurisdiction to Render a Judgment as to the Non-Resident Defendant, May Company.

The case of *Western Union Telegraph Co.* v. *Nester* (C. C. A. 9) 106 Fed. (2d) 587, was instituted in the District Court for the Southern District of California. The facts of the case were much less favorable to Federal jurisdiction than are the facts of the case at bar. Therein the complaint consisted *of but a single count* alleging negligence against both the resident defendant, Inie, and the non-resident defendant, Western Union. The District Court found that the resident defendant was either grossly negligent or grossly incompetent (25 Fed. Supp. 478, 480). In other words, the District Court found that there was a just claim against the resident individual and the non-resident Western Union because of negligence on the part of the resident employee, but that the plaintiff had failed to establish any injury arising therefrom. It therefore dismissed the case against the resident defendant Inie, and rendered judgment on its statutory liability against the non-resident defendant Western Union.

In the present case, the evidence did not go as far as in the *Nester* case, in that it failed to establish any negligence on the part of the resident defendant Goddard; in fact the plaintiffs did not even attempt to introduce any evidence of negligence upon his part. No attempt was made to show that Goddard had any control over the escalator or that in reversing the same he did anything that a normally prudent person would not have done.

If the dismissal of the action by the court in the *Nester* case as to the resident Inie, against whom negligence was established, nevertheless conferred jurisdiction to render a judgment as to the non-resident Western Union, certainly a similar dismissal as to the resident Goddard in the present case, against whom no negligence whatsoever was estab-

lished, likewise confers jurisdiction on the court to render judgment as to the non-resident May Company.

It is true that in the *Nester* case no appeal was taken from the judgment in favor of the resident defendant Inie, but we submit that the jurisdiction of the District Court to render a judgment between the plaintiff and the non-resident defendant Western Union could not depend upon future action to be taken or omitted by the plaintiff. At the time it rendered its judgment the court either had jurisdiction or it did not have it, and an appeal or a failure to appeal from another part of that same judgment could not operate to confer or oust such jurisdiction.

Moreover, while the notice of appeal may have been sufficiently broad to have constituted an appeal from the judgment in favor of the resident defendant Goddard, nevertheless, as we have previously pointed out in this brief, no attempt was made in the briefs or upon oral argument to advance any reason why the judgment dismissing the action as to that non-resident defendant Goddard should not, upon the merits, be affirmed. The failure to advance any such argument constitutes an abandonment of the appeal. Consequently, the status of the case at bar before the Circuit Court of Appeals was, in fact, exactly the same as that of the status of the *Nester* case.

Though the Supreme Court reversed the decision of the Circuit Court of Appeals in the *Nester* case (*Western Union Telegraph Co.* v. *Nester*, 309 U. S. 582; 84 L. E. 960), it did so upon other grounds. While the court does not discuss the jurisdictional point, and we understand that it was not raised by the parties, nevertheless the form of reversal necessarily assumes the jurisdiction of the District Court. Thus, in remanding the case, the Supreme Court says (p. 964, 84 L. E.):

> "The challenged judgment must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion."

In fact the *Nester* case is but another example of the rules laid down by the Supreme Court from its earliest times and uniformly followed ever since.

In *Horn* v. *Lockhart*, 17 Wall. 579, 21 L. E. 657, the plaintiff brought a suit in the federal courts against an executor attacking the probate of the will, the accounts of the executor, and charging him with malfeasance in his administration of the estate. The complaint joined all parties interested in the estate, including McPhail and wife, who were residents of the same state as plaintiff. The McPhails defaulted and a decree *pro confesso* was entered against them. Subsequently the defendant executor made a motion to dismiss based on lack of jurisdiction because of the residence of the McPhails. The court took this motion under submission and ordered the case to proceed, which it did. The court rendered judgment by which the probate of the will was sustained, the executor was charged with certain items, and the complaint was dismissed as to the McPhails. In upholding the jurisdiction of the court and affirming the judgment, the court says, page 660:

> "The objection to the jurisdiction of the court, that two of the defendants were residents of Texas, the same State with the complainants, was met and obviated by the dismissal of the suit as to them. They were not indispensable parties; that is, their interests were not so interwoven and bound up with those of the complainants, or other parties, that no decree could be made without necessarily affecting them."

In *Connolly* v. *Taylor*, 2 Pet. 556, 565, 7 L. Ed. 518, 521, the court says:

> "So in this case. The substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the

exercise of that original jurisdiction which the court possessed between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course."

In *Vattier* v. *Hinde*, 7 Pet. 252, 261, 8 L. ed. 675, 679, the court says:

> "This certificate applies to the state of parties at the time of the decree, and affirms this principle. If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them over whom the court has jurisdiction without affecting the interests of others, its jurisdiction may be exercised as to them.
>
> "*If, then, when this cause came on for hearing, Abraham Garrison had still been a defendant, a decree might then have been pronounced for or against the other defendants, and the bill have been dismissed as to him,* if such decree could have been pronounced as to them without affecting his interests.
>
> "We perceive no principle of reason or law which opposes this course. The incapacity of the court to exercise jurisdiction over Garrison could not affect their jurisdiction over other defendants whose interests were not connected with his, and from whom he was separated by dismissing the bill as to him." (Italics ours.)

See also:

Jennings v. *United States* (C. C. A. 8), 264 Fed. 399; *Hicklin* v. *Marco* (C. C. A. 9), 56 Fed. 549; *Sioux City* v. *Trust Co.* (C. C. A. 8), 82 Fed. 124; *Smith* v. *Consumer's etc.* (C. C. A. 5), 86 Fed. 359; *Tug River* v. *Brigel* (C. C. A. 6), 86 Fed. 818; *Westfeldt* v. *N. C. Mining Co.* (C. C. A. 4), 166 Fed. 706; *Jackson* v. *Jackson* (C. C. A. 4), 175 Fed. 710; *Silver King* v. *Silver King* (C. C. A. 8), 204 Fed. 166; *Thomas* v. *Anderson* (C. C. A. 8), 223 Fed. 41; *Galveston* v. *Foster* (C. C. A. 5), 284 Fed. 932; *Drumright* v. *Texas etc.* (C. C. A. 5), 16 Fed. (2d) 657.

It is, therefore, respectfully submitted that the District Court had jurisdiction to render its judgment:

(1) Because the complaint stated separable and separate causes of action against the non-resident defendant, May Company, based upon the alleged maintenance by it of an instrumentality attractive to children, in which cause of action the resident defendant, Goddard, was not even a proper party;

(2) Because the defendant, Goddard, was not an indispensable party to the controversies between the resident minor plaintiff and the non-resident defendant, May Company, and

(3) Because of the attaching of jurisdiction as to the defendant, May Company upon the dismissal of the case as to the defendant Goddard.

POINT IX.

Had the Circuit Court Considered the Case on its Merits the Judgment of the District Court Would Have Been Affirmed.

This point is urged upon the authority of *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555, 75 L. E. 544, which holds that on writ of certiorari to review a judgment of a Circuit Court of Appeals the entire record is before this court, with power to review the action of the Circuit Court of Appeals and direct such disposition as that court might have made of it upon the appeal from the District Court.

As regards the defendant Goddard, there is a complete absence of any evidence in any wise tending to show negligence upon his part. There is no evidence that what he did was not, in fact, the best and wisest thing to have been done. There is no evidence that any negligent action upon his part contributed to any injury sustained by the minor plaintiff.

As regards the defendant May Company, there is likewise no evidence of any negligence upon its part in the construction, operation, supervision or control of the escala-

tor, and the authorities cited by the District Court in its opinion clearly establish that the plaintiffs were not entitled to a judgment under either the doctrines of attractive nuisance or *res ipsa loquitur*.

CONCLUSION.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals for the Ninth Circuit herein should be reviewed by this Court for the reasons, as hereinabove shown, that said judgment is in conflict with decisions of other Circuit Courts of Appeals, is probably in conflict with decisions of this Court, and decides an important question of Federal law of wide application and general interest patently incorrectly and that, therefore, writ of certiorari should be granted in order that this Court may review said decision of the Circuit Court of Appeals herein and finally reverse same.

WALTER O. SCHELL,
GERALD F. H. DELAMER,
JOSEPH H. WHEELER,
Counsel for Petitioners.

FRANK J. HOGAN,
EDMUND L. JONES,
Of Counsel for Petitioners.